

Argyle Conversations

by ARGYLE EXECUTIVE FORUMSM

featuring

David I. Mossé

SVP, General Counsel
and Corporate Secretary
Dick's Sporting Goods, Inc.

&

Elisa Cooper

Director of Product Marketing
MarkMonitor

On October 18, 2011, David Mossé, SVP, General Counsel and Corporate Secretary, Dick's Sporting Goods, Inc. and Elisa Cooper, Director of Product Marketing, MarkMonitor, discussed the challenges and opportunities of operating an in-house legal department as well as tackling current e-commerce issues, including trademark infringement and brand protection.

David Mossé David I. Mossé is the Senior Vice President, General Counsel and Corporate Secretary of Dick's Sporting Goods, Inc. Before joining Dick's, David served as Senior Counsel, Chief Compliance Officer and Investment Team Member of Trian Fund Management, LP, an investment firm based in New York, and prior to that as Vice President and Assistant General Counsel of Triarc Companies, Inc., the franchisor of the Wendy's and Arby's restaurant systems. David began his career as a Corporate Associate for the New York law firm of Cravath, Swaine & Moore and later practiced as a Senior Attorney at Venture Law Group in Palo Alto, CA. David earned his Bachelor of Arts degree from Duke University and his Juris Doctor from New York University School of Law. David is married with three young boys and serves as a Director of The Dick's Sporting Goods Foundation and as a member of the Board of Trustees of the Pittsburgh Public Theatre.

Elisa Cooper Elisa Cooper is Director of Product Marketing for MarkMonitor. With 15 years of experience, she is an expert in the field of online brand protection and domain name management. Elisa has worked closely with many Fortune 1000 companies in assisting with domain and brand protection policy development. She has spoken and written extensively on these topics with articles appearing in *Managing IP*, *eCommerce Law and Policy*, *eCommerce Law and Strategy* and *CircleID* and is an active member of ICANN's Business Constituency, the International AntiCounterfeiting Coalition and the Online Trust Alliance. She completed undergraduate and graduate studies at San Jose State University in the field of communications.

ELISA COOPER: You joined Dick's Sporting Goods relatively recently—in 2010. Can you share a little about your background and how you came to join Dick's?

DAVID MOSSÉ: My professional background started with Cravath, Swaine & Moore in New York in 1997 after I graduated from NYU Law School. I worked there for two and a half years and then went to the West Coast to chase the dot-com boom. I joined the firm Venture Law Group, a boutique Valley firm comprised of lawyers that had spun out from Wilson Sonsini and operated effectively as a hybrid law/venture capital firm. My timing wasn't great as I arrived in early 2000 at the peak of the internet boom, and then the bubble burst. I spent two years there before deciding to come back to New York and rejoin Cravath. I was eventually introduced to a public company called Triarc that was controlled by Nelson Peltz and Peter May, long-time operators and investors. Triarc had a holding company structure that owned a series of different businesses. For example, in the '90s, Triarc had bought Snapple from Quaker Oats, turned it around, and then sold it to Cadbury for a significant profit. As a result, when I joined, Triarc had a lot of cash on the balance sheet and was actively looking for new businesses to acquire. Since I come from an entrepreneurial background, the business side of things has always been of interest to me. Joining Triarc was a unique opportunity for me to go in-house and not only learn the ropes as a public company lawyer, but also continue to do M&A and capital markets transactions as well as work with and learn from Nelson and Peter, who are very well-known and well-respected operators. I wanted to learn, even if only through osmosis, how they think about markets, industries and growing businesses.

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Beginning in 2005, we leveraged Nelson and Peter's reputations and track record to raise institutional capital and launch Trian Partners, a private investment firm separate from Triarc. Trian's investment strategy is commonly known as shareholder activism, though initially we called it “operational activism” because we were focused on improving companies through the income statement and operations as opposed to what a lot of other activist investors were doing,

which was more balance sheet-focused. The senior management team from Triarc migrated to Trian Partners and Triarc became a pure-play restaurant company that owned Arby's and eventually acquired Wendy's. It was neat to reinvent myself as an investment fund lawyer while still doing the transactional and securities work that I enjoy, due to the nature of the investments and how we made them.

In 2010, without any focus on pursuing another opportunity, I was approached regarding the opportunity at Dick's. Dick's had been looking for a new general counsel and had initially focused their search on someone more seasoned who had been a sitting general counsel somewhere before. The firm that was conducting the search understood what I brought to the table and felt that I would be a very good fit if Dick's was willing to consider it, and they were. On paper, it seemed like a great match, so I went out to meet the executive team, and here we are today.

What skills did you bring from Triarc Partners that help you in your role at Dick's?

One thing I learned [at Triarc] was to interact with and be responsive to a very demanding leader. Nelson Peltz is an incredible businessman and he's very demanding of his team. Similarly, Dick's is a controlled company; it's run and controlled by Ed Stack, who is the founder's son. It's simply a different environment when you have a Chairman and CEO who has that level of emotional and financial investment as well as control and influence. So I think having that experience with Nelson was important. I also think having the operational experience and really understanding the language and the mechanics behind running a business was helpful. The work I did and the operational exposure I had while at Triarc and Triarc enhanced my core skill set as a lawyer and positioned me to take on the role and succeed at Dick's.

You've spent some time building the legal team at Dick's. Can you share some of the best practices you've employed to do that?

We are still a young department, not necessarily in age but in terms of solidifying the foundation, so a lot of the work I've done in my first year has been foundational work. One of my first priorities was to realign how we interact with the rest of the business. When I started, the way the work flowed in and people interacted with other departments was controlled chaos at best. Dick's has a lot of different business units: we have the support or administrative functions, like finance, risk and compliance, IT and HR; we also have merchandising, product development, e-commerce, marketing and supply chain. So we assigned the generalist lawyers to be what I call "primary relationship managers" for one or more business units and, in that way, instilled a sense of ownership on their part with respect to that business unit. It also gives the business folks a sense of consistency and relationship that they didn't have before.

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It also creates some degree of de facto specialization among the generalists. It's common for attorneys who go in-house—unless they're specialists, such as real estate or employment—to not want to be pigeonholed, but the business needs them to have some degree of expertise. By aligning them with a business unit, it creates that kind of expertise over time. I will also "shuffle the decks" over time to give these attorneys an opportunity to develop different skill sets.

We currently have seven lawyers, three paralegals and three legal assistants. By the end of the year, we expect to have ten lawyers (two focused on real estate, one focused on employment and litigation and the remainder being generalists), four paralegals (one focused on real estate, one on IP, one on litigation and one on corporate) and three legal assistants.

What about outsourcing? Are you moving in that direction or pulling back? When do you decide to utilize outside counsel or do it in-house?

I encourage our team to figure out what the priorities of the business units are and try to be as involved with those as possible. We should know what's creating the most value and/or risk for each unit. Some of those will be technical in nature and we'll need to get outside counsel involved. But to the extent that we can, over time, build the experience to handle those things in-house, that's where I stress that we keep the work. It builds credibility and trust with the business units because, if you're constantly outsourcing the work that's most important to them, you're eroding that relationship.

We don't currently have lawyers with strong M&A, securities and capital markets backgrounds, other than myself, so a fair amount of that work still gets outsourced, but I expect we will fill that gap within the next few months and be able to recapture some of that work.

What is the hiring environment like for these kinds of specialized in-house positions? Are you finding that there are lots to choose from, or is it still difficult to find exactly what you're looking for?

At a senior level, it's still relatively difficult. I'm looking not only for the right skill set but the right cultural fit, and that takes time. They could be in our backyard, on the West Coast or somewhere else, so we do look outside of Pittsburgh and that brings the added element of relocation. At a more junior level—and we've got a couple of those searches out there now—we've received a tremendous amount of resumes. It really gives you the sense that there are a lot of unemployed lawyers out there, but the quality is still a little sparse.

What are the biggest challenges or issues you're facing right now?

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At an enterprise level, the biggest challenge we face is the evolution of retail: where retail, particularly sporting goods retail, is going to be three or five years from now and how to keep up with current trends. Technology plays a big role in that, as can we as a market and thought

leader. The way we interact and shop now is completely different than it was five years ago. We need to spend time thinking about the customer's total experience—in our stores and online, on their smart phone or tablet. Redefining that customer experience is both our biggest opportunity and our biggest challenge.

What role do you play in helping to define, implement, or move that into any one direction?

When we have conversations about long-term strategy, challenges and opportunities, each member of the senior leadership team is encouraged to bring their experiences and points of view to the table

and contribute to the dialogue as though they were leading the company and responsible for mapping out the future. In order to be able to engage in that dialogue, you have to build credibility, particularly with our Chairman and CEO. Once you do, it's a very collaborative effort. The conversation is more of a white board and we all contribute to what populates it.

What are some other challenges your department is currently facing?

One is certainly building the right skill set for the environment. From a customer engagement standpoint, for example, there's an entirely different set of rules and regulations in the digital world that is constantly evolving. You have to find ways to gain the experience and knowledge that people at social media enterprises have today. So if you are the primary relationship manager for our marketing or e-commerce group, one of your challenges is monitoring trends, mapping out the associated legal and regulatory landscape and putting in place practical policies and procedures to mitigate risk. You need to figure out how to educate yourself in evolving areas and bring that experience to the team.

The other challenge we have is that we are tremendously busy and, even as we add people to the department, it doesn't reduce the workload. On the one hand, I view it very positively as it signifies that the company really sees the value we bring to the business, but in-house lawyers also expect a degree of work-life balance they did not have as law firm attorneys. So we're making sure that we find ways to live up to the promise without compromising how we serve the company.

Let's talk about some of the digital issues related to commerce on the internet and your presence there. When it comes to trademarks and brand protection, what kind of challenges are you facing? How are you approaching and resolving those conflicts?

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When it comes to the internet and intellectual property, the first point of intersection is the technology that you use to communicate with the customer. With respect to our DicksSportingGoods.com business, we have a long-term relationship with a company recently acquired by eBay

called GSI Commerce. We've been seeing a tremendous amount of activity out there from NPEs, or non-practicing entities, and because all of the technology behind our e-commerce capabilities is from GSI, they're the first line of defense against potential digital intellectual property infringement. The environment around patent troll litigation certainly makes us even more vigilant when we enter into relationships with third parties and use their technologies because we need to make sure that we're protected from an infringement standpoint. If we build and own the technology, that's one thing; but if we're outsourcing, we want to make sure that we're properly indemnified, as defense costs can add up pretty quickly. And there are other things we do, like the way we interact by e-mail or mobile, that might not involve GSI and we need to be more mindful there as well.

With regard to trademarks, that implicates the product development side of our business, which is a

big deal for us. What might be surprising to some is that around 15-16% of our sales are comprised of private brands. These range from brands we've developed ourselves in-house, like the outdoor brand Koppen, to brands we've acquired from third parties, such as golf brands Maxfli and Nickent, to brands we license on an exclusive basis in a particular category, such as adidas for baseball products and Field & Stream for the hunt/fish/camp categories. It's an important way for us to diversify away from being perceived exclusively as a "house of brands" like Nike, Under Armour and North Face and to differentiate ourselves with the consumer by offering strong brands that they can't find anywhere else.

The other brand that we focus on, of course, is the Dick's brand. We have a new Chief Marketing Officer that joined us from Pepsi shortly after I joined and one of the things she's focused on is elevating the Dick's brand so that when you go into our store or online you have a consistent experience of what the Dick's brand means and see it elevated above the various brands we carry.

Are you proactively monitoring those special brands online to see whether or not they might be sold through other channels—either gray market or even counterfeit distribution of those goods—or is that something you handle more on a reactive basis?

I would say that we're probably more reactive at this point. As those brands build more brand equity and if we take the distribution of those brands outside of the U.S. and they become more recognized in places like Europe and Asia, then we will certainly become more proactive.

Have you had issues of cybersquatting or infringement of the Dick's mark? If so, have you addressed those, or is it not a high priority at this point? I imagine that must be a difficult market to address.

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It is. Since I joined, we've had some success in acquiring names that were previously owned by less wholesome enterprises. In one case, it was good old fashioned investigative work to find out who owned the domain, and then we worked with a trusted third party to conduct the negotiations and try to maintain some degree of anonymity throughout the process. We succeeded by being persistent and offering the right price. There will be some new challenges, of course, as the rules around gTLDs get solidified.

What other things do you think Argyle members should know about your experience at Dick's that might be helpful when making a transition from one industry to another?

I think a critical key to success out of the gate is to develop a strong relationship with senior management. It starts at the top because the tone that the CEO sets regarding the legal function and the head of the legal department is going to dictate how you're perceived throughout the organization. So that was a big part

of how I spent every day during my first six months to a year: thinking about those relationships and making sure they continued to move forward in the right way. As lawyers in law firm settings, and in other settings where we're not in charge of the department, we're so used to putting our heads down and getting our work done that we don't consider the value of stepping out of our offices and building those relationships. If you want to be successful, you really need to make that investment.

Another important factor for me is recognizing that the collection of experiences I've had over time, both professional and personal, is the reason why I was hired. We have a collaborative culture that not only respects various points of view but demands accountability and participation. Rather than restrict my involvement and my influence to legal matters, the onus is on me to collaborate with the senior leadership team to help shape the future of the company. ■